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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-615

RALPH PRUDHOMME,

Petitioner

versus

AL JOHNSON CONSTRUCTION COMPANY-MASSMAN CONSTRUCTION COMPANY, A JOINT VENTURE, AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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The petitioner, RALPH PRUDHOMME, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 15, 1973.

OPINIONS BELOW

The opinion of the U. S. District Court for the Western District of Louisiana, Opelousas Division, is unreported, and appears at Appendix A, *infra*. The opinion of the Court of Appeals for the Fifth Circuit, as yet unreported, appears at Appendix B, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit (Appendix B, infra) was entered on June 15, 1973. A timely petition for rehearing was denied on July 11, 1973 (Appendix C, infra). The jurisdiction of this Court is invoked under 20 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

Whether the trial judge acted contrary to statute and the specific mandate of the Supreme Court of the United States by denying the petitioner a jury trial of his cliam under the Jones Act.

Whether the trial judge invaded the province of the jury by directing a verdict when substantial questions of fact were presented on the issue of petitioner's seaman status.

Whether the Court of Appeals for the Fifth Circuit, in affirming the trial court's decision, acted contrary to its own prior rulings, as well as those of appellate courts in other circuits, thereby creating a conflict in the jurisprudence.

STATUTORY AND RULES PROVISIONS INVOLVED

The petitioner filed his complaint and sought a jury trial under the provisions of the Jones Act, 38 Stat. 1185, 41 Stat. 1007, 46 U.S.C. Section 688. The pertinent portion of the Jones Act reads as follows:

> "Any seman who shall suffer personal injury in the course of his employment may at his election maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply***."

The trial court directed a verdict under the provisions of Rule 50(a) of the Federal Rules of Civil Procedure, Title 28, U.S.C.:

> "A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

STATEMENT OF FACTS

The defendants in the above captioned matter had contracted to construct a substructure of a new bridge across the

Atchafalaya River at Krotz Springs, Louisiana. Plaintiff was hired on July 31, 1970, as a carpenter to aid in the fulfillment of this contract. A total of four piers were to be constructed to support the roadway, the number 1 pier on one bank, numbers 2 and 3 in the river itself, and number 4 on the opposite bank. In the course of construction of the bridge, two derrick barges, two concrete barges, five work barges and one tug boat were in use at the construction site.

The number 2 and 3 piers in the river were constructed by filling steel caissons with concrete and then sinking them into the river bed. Concrete was poured into the caissons through a funnel-shaped device held in place on top of the steel caissons by a brace called a hopper support form. On October 21, 1970, petitioner was ordered by his foreman to move the hopper support forms on pier number 3 because the concrete was not falling into the steel caissons in the proper place. Although the moving of the forms should have been done by the crane on the derrick barge (Tr. 11, 138, 215, 298), the plaintiff and another carpenter were ordered to move the forms with the aid of two steel pinch bars. In moving the last of the hopper support forms, the petitioner's pinch bar slipped, and the plaintiff sustained back, arm and leg injuries in trying to prevent his fall. He suffered a ruptured disc and was required to undergo surgery to correct that problem. (Tr. 18)

As a result of the pinch bar incident and the injuries he received, the petitioner filed suit in the U. S. District Court for the Western District of Louisiana, Opelousas Division, which had jurisdiction of the case under the provisions of the Jones Act, 46 U.S.C. Section 688. By order of the trial judge, the case came to trial before a jury only on the questions of

status and liability, and after hearing evidence presented by both the petitioner and the defendants, the trial court granted the defendant's motion for a directed verdict denying the petitioner's status as a Jones Act seaman.

In support of the petitioner's contention that he was a seaman within the meaning of the Jones Act, the following testimony and evidence was presented during the course of the trial:

(1) Although the petitioner was not assigned to one particular barge, a specific fleet of work barges was present at the job site for the duration of the construction and all of these barges were used by the petitioner and his co-workers in the performance of their duties. (Tr. 23, 25, 70, 224) "We used all of them." (Tr. 24) "Whichever one we needed we used." (Tr. 33)

(2) All of the carpenters, including petitioner, were hired for the duration of the construction work because the employer wanted to keep regular crews. (Tr. 225)

(3) The crew of carpenters, including the petitioner, used the barges as an integral part of the construction work: They used the barges to transport the hopper support forms, dredge well covers, concrete forms, lumber, and pile driving equipment from the shore to the caissons as that equipment was needed in the construction of the piers; the carpenters, with the help of the rig on the derrick barge, also did the loading and unloading of all of the equipment they used. The barges were, in effect, staging areas from which the equipment and the forms needed to construct the bridge piers were assembled directly in the river at the pier site and then dis-

assembled as each stage of the construction was completed. (Tr. 25-27, 70, 90, 217-219)

(4) Some of the work of welding on the caissons, cleaning, repairing, or assembling the hopper support forms, concrete forms, keyways, dredge wells and dredge well covers, etc., in addition to the transporting, loading and unloading of this equipment, was performed on board the work barges. The various witnesses, including the petitioner, testified that the carpenters worked over the water thirty to forty per cent of their time (Tr. 28), sixty per cent of their time (Tr. 73), fifty per cent of their time (Tr. 93), and fifty per cent of their time (Tr. 124). All but the last of these witnesses testified that about one-half of this time was spent working on the barges themselves. Apparently the last worker could not separate work on the caissons from work on the barges—to him it was all part of the same job:

"Q. How much time did you spend working out over the water?

"A. Well, it varied. I mean, probably about 50% of the time we worked over the water.

"Q. How much time did you spend working on the barges?

"A. Well, when you're working on the caisson, you've got to work off of the barge and on the caisson you know. I mean I don't remember exactly."

•••

"Q. Let me rephrase that. Did you work regularly on these barges?

"A. Well, when we would be working on the water, you've got to work on the barge. That's the only place you could work. That was the only place." (Tr. 124-125)

(5) The petitioner welded some patches on one of the barges that needed repairing, and he constructed and attached a toilet facility on another one. (Tr. 28, 220-221)

(6) When using the barges, the carpenters, including the petitioner, formed the barges' **only** crew: They handled the lines to the tug when the barges were moved, they tied and untied the lines at the shore and at the pier sites. The carpenters were responsible for their maintenance whenever they used them, and they stored their tools on the barges. (Tr. 23-24, 72, 91, 92, 127, 128 and 220)

(7) The carpenters received a bonus of twenty-five (25¢) cents per hour as over water pay, and a review of the petitioner's time sheets (introduced into the record as defendants' Exhibit #1) reveals that he was given credit for being over the water thirty-eight (38%) per cent of the total time that he was on the job at the construction site. Those time sheets also reflect the fact that the petitioner worked on the barges for twenty-one of the last thirty-eight work days before his injury, in work periods that varied from one-half hour to eight hours in length. Furthermore, his foreman testified that the work sheets were not entirely accurate, since it was brought out at the trial that on several occasions the petitioner was working over water and did not receive credit for over water pay. (Tr. 185, 191) For instance, on October 21, 1970, the day that petitioner was injured on pier number 3, the work sheets reflect that he was not even out on the water

that day. (Tr. 185) On another occasion, he worked for six hours over water, and got no water pay credit. (Tr. 191) In addition, work sheets for August 22nd and 23rd and September 7th, were missing from Mr. Prudhomme's work record when he testified in court, so that the time the petitioner spent over the water on those days was not known. (Tr. 190, 200) A review of the work sheets also reveals that for four occasions, October 6th, 7th, 12th and 13th, there was a total of seven and one-half hours of work not listed as water pay (in addition to the time listed which was over water on those days), yet which was obviously spent over water. These included times that the petitioner was loading and unloading hopper support forms, nose forms and dredge well forms from or onto the barges.

ARGUMENT

Once again, a district court, with the subsequent approval of the Court of Appeals, has invaded the province of the jury, substituting its judgment for theirs. Once again, a citizen's right to a jury's determination of the merits of his case has been usurped by the trial judge. Once again, a petitioner is asking this Honorable Court to remind the appellate and trial courts of the respective functions of the judge and the jury, and to allow the petitioner to submit his case to the jury. [See *South Chicago Co. v. Bassett*, 309 U.S. 251 (1940); *Gianafala v. Texas Co.*, 350 U.S. 879 (1955); *Senko v. LaCrosse Dredging Corporation*, 352 U.S. 370 (1957); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958); *Butler v. Whiteman*, 356 U.S. 271 (1958).]

I. SEAMAN STATUS UNDER THE JONES ACT IS A

QUESTION OF FACT TO BE DETERMINED BY THE JURY.

Workers engaged in activity on vessels in navigable waters have long had a statutory right to a trial by jury under the Jones Act, 46 U.S.C. Sec. 688, for injuries received in the course of their employment. Part of that right includes a jury determination of seaman status, as this Court has held many times, beginning with its *South Chicago* decision, supra. In explaining and reaffirming that decision, this Court subsequently held in *Senko, supra*, that:

> "Whether or not an employee is 'a member of a crew' turns on questions of fact and that, if a finding on this question has evidence to support it, the finding is conclusive.*** Our holding [in *South Chicago*] that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact."

See also *Gianafala, supra*; *Butler, supra*; *Grimes, supra.*

In his dissent in several of these cases, Justice Harlan demonstrated just how limited the facts can be in favor of the claimant for him nevertheless to have the status question go to the jury. In the *Senko* decision, the complainant was "simply a handyman and assistant for a crew of men operating an earth moving machine which happened to be afloat and which, occasionally and always in Senko's absence, was pushed from place to place.*** His duties there were miscellaneous, consisting of serving as assistant and handyman to the team of men operating the earth removing pumps. He carried supplies from shore to dredge and back, cleaned up the dredge,

filled the water-cooler, and did errands on shore.*** His connection was not with the vessel but with the construction gang. He had no duties connected with navigation***." *Senko, supra*, at 376, 378, Harlan, J., dissenting. The petitioner in *Grimes v. Raymond Concrete Pile Co.*, was employed as a pile driver on a "Texas Tower" construction project, a triangular metal platform superimposed above the surface of the ocean and permanently affixed to its floor. The petitioner did "sporadic work for a few hours on the barge, a minor incident to his continuing employment as a pile driver on the tower***." It was this sporadic work on the barge which the Supreme Court deemed sufficient evidence of seamanship to require that the status question be submitted to the jury. *Grimes, supra*, at 254-255, Harlon, J., dissenting. The decedent in the Butler case was employed as a laborer performing odd jobs around respondent's wharf, and on the morning of the accident, he had been engaged in cleaning the boiler of a tug. For approximately nine months prior to the decedent's death, the tug had neither captain nor crew and reported no earnings. A barge "was moored to the wharf and the tug was lashed to the barge.*** [The decedent] was last seen alive running across the barge to the tug***." *Butler, supra*, at 272, Harlan, J., dissenting. Justice Harlan concluded in *Grimes* that "if the 'standing' requirements of the Jones Act are still to be regarded as having any real content, I can find no room for debate that this individual is not a seaman, unless a 'seaman' is to mean nothing more than a person injured while working at sea." *Grimes, supra*, at 255, Harlan, J., dissenting. Yet, Justice Harlan was writing the dissenting opinion in these cases, and the majority of the Court held that individuals with as little factual connection to maritime activity as those reviewed above should have their Jones Act seaman

status question submitted to the jury. A review of the facts and inferences that could be drawn from the evidence presented at the trial of the case at hand reveals an injured worker whose connection with the maritime world was demonstratively much more substantial than being merely "injured at sea." For the trial court to have directed a verdict in the petitioner's situation is directly contrary to the Supreme Court's mandate that Jones Act seaman status is a fact question to be determined by the jury.

II. THE EVIDENCE PRESENTED EXCEEDED THE MINIMAL STANDARDS FOR A DIRECTED VERDICT AND MET THE *ROBISON* STATUS TEST.

As the Fifth Circuit has noted in *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972), "[I]t is a rare case indeed in which a court may conclude as a matter of law that an injured individual is not a seaman within the meaning of the Jones Act.*** The facts of these two cases [*Grimes* and *Senko*] make it plain that the issue is to be left to the jury even when the claim to seaman's status appears to be a relatively marginal one." *Barrios, supra*, at 1162. A trial judge is justified in taking a case from the jury and in directing a verdict "only where the evidence points **all one way** and is susceptible of **no** reasonable inferences sustaining the position of the non-moving party.*** In making this determination, the evidence together with all reasonable inferences to be drawn therefrom must be viewed in the light most favorable to the non-moving party." *Giardano v. Lee*, 434 F.2d 1227, 1231 (8th Cir. 1971). (Citations omitted) For similar language see *Federal Deposit Insurance Corp. v. Lott*, 460 F.2d 82 (5th Cir. 1972); *United States v. Bucon Construc-*

tion Co., 430 F.2d 420 (5th Cir. 1970); *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969).

In conjunction with this severely restrictive evidentiary standard for directed verdicts, the Fifth Circuit has set forth a test for the type of evidentiary basis necessary in Jones Act cases to send seaman status questions to the jury:

> "There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. *Offshore v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)."

In the case of *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960), the Court expanded the concept of permanent assignment or substantial work aboard a vessel to cover a fleet of several specified vessels, noting that there is nothing mechanical in the seaman status concept to make status dependent on service aboard only one vessel. The service need only be aboard several identifiable ships.

In the instant case it cannot realistically be gainsaid that petitioner minimally, "performed a substantial part of his work on the vessel" and "the duties which he performed contributed to the accomplishment of its mission," i.e., necessarily assisting in the construction of the bridge. Only if nothing

was presented in the course of a trial on the merits that might have led reasonable men to decide otherwise could a trial judge have properly directed a verdict adverse to the claimant. In so directing a verdict in this matter, the trial judge ruled that there was no evidence presented that the claimant, Ralph Prudhomme, was permanently assigned to any vessel or fleet of vessels, that he did no substantial work aboard those vessels, and that he was not injured in the service of any vessel. Such a ruling is contrary to the evidence presented in the case and to the law as outlined by the Supreme Court and the Fifth Circuit.

A. Permanent Assignment-Substantial Work Aboard a Fleet of Barges

When the Fifth Circuit has approved the denial of seaman status as a matter of law (and not been reversed by the Supreme Court), the cases were ones in which an employee's connection with a specific vessel was clearly incidental to the performance of his regular work assignment, and only temporary in duration. Let us briefly review those cases.

For example, in *Keener v. TransWorld Drilling Company*, 468 F.2d 729 (5th Cir. 1972), a worker on a fixed stationary drilling platform performed interim work on the drilling tender while platform equipment was inoperative. He was injured on the platform after this temporary tender assignment had ended, and the Court ruled that as a matter of law the one fortuitous work venture aboard the vessel did not grant Keener permanent seaman status. But Keener's situation was certainly different from Prudhomme, the petitioner in the present case, who was aboard the same barges almost daily, not incidental to some other job, but as an integral and

essential part of the bridge construction: the use of the work and derrick barges was essential in the construction of the bridge over a river as wide and swift as the Atchafalaya. (See Tr. 217-20, 191-207 for a discussion of how large a part the barges played in the pier construction.)

Similarly, *in Cox v. Otis Engineering Corp.*, 474 F.2d 613 (5th Cir. 1973), the claimant's seaman status was denied by the trial court on motion for summary judgment. He was employed as a wire line operator who was not assigned to or doing anything other than temporary work on any particular drilling barge. His total assignment to the barge upon which he happened to be injured was for a period of only two days.

And in *Ross v. Mobil Oil Corp.*, 474 F.2d 989 (5th Cir. 1973), the plaintiff was a welder who worked, ate and slept aboard a stationary production platform thirty-five miles off the coast of Louisiana. He was temporarily assigned to cut header supports for loading equipment from the platform on to a nearby barge. This temporary diversion from his usual employment aboard the stationary platform was insubstantial, and the Court of Appeals affirmed the trial court's denial of seaman status on a motion for summary judgment. In *Cox* and *Ross*, as in *Keener*, the employees' relationships to the vessels in question were short, one-shot affairs clearly fortuitous as to the allegedly status-giving vessels, and of only temporary duration. On the other hand, the evidence in the instant case revealed that the petitioner was continually using the same barges in the course of his work, for the complete term of his employment, and the aforementioned instances in which seaman status was denied as a matter of law are clearly inapposite. See also *Thomas v. Peterson Marine Service, Inc.*,

411 F.2d 592 (5th Cir. 1969); *Rotolo v. Halliburton Co.*, 317 F.2d 9 (5th Cir. 1963).

In the text of the trial judge's opinion are findings that Mr. Prudhomme used the barges for transportation for himself and his supplies, that he aided in the navigation of these barges, that he performed part of the carpentry work aboard the barges, that he did some welding on one of the barges, that he loaded and unloaded the barges, and that he received a pay bonus for time worked over the water. While omitting further information presented during the course of the trial, this evidence alone indicates a more than incidental and tenuous relationship with the barges, and clearly demonstrates the substantiality of that relationship, thus making status a question of fact for the jury. As long as more than an isolated incident of seamanship has been demonstrated, the substantiality issue cannot be decided as a matter of law. The Fifth Circuit stated precisely this in *Keener, supra*, when it noted that "just as there can be no precise delineation of that quantum of duties which, when performed on board a vessel, will make the employee a seaman, similarly there is no bright line test to be applied in determining the degree of frequency and regularity of performance which must be shown in order to claim the status." *Keener, supra*, at 731-32. More than one isolated occurrence is necessary; much more than one isolated occurrence was demonstrated by the trial judge himself.

In addition to the time spent on the barges during the course of his employment, the claimant in this case performed a portion of his duties on shore or on the bridge caissons themselves. However, this does not destroy seaman status as a matter of law, when more than a temporary and incidental

connection with the vessel has been demonstrated. Substantiality of work performed aboard a vessel is a question for the jury; in the context of rulings of law, it merely means something more than insubstantial. In its *Keener* decision, the Fifth Circuit provided this guidance:

> "We do not hold that an employee must perform all of his duties or even a greater part of them, aboard the vessel in order to be considered a seaman. We merely hold that to meet the requirement of *Robison* that the workman 'performed a substantial part of his work on the vessel' it must be shown that he performed a **significant** part of his work aboard the ship with at least **some** degree of regularity and continuity." *Keener, supra*, at 732. (Emphasis ours.)

In *Kimble v. Noble Drilling Corp.*, 416 F.2d 847 (5th Cir. 1969), the Court observed that the plaintiff, a driller aboard a stationary platform, did **most** of his work aboard the platform. However, part of his duties also involved overseeing the mixing and pumping of the drilling mud aboard the tender, and the connecting and disconnecting of lines from the tender to the platform when the tender was moved. Even with this relatively minor connection to the vessel, the Court ruled that the plaintiff's status as a seaman was a jury question. The *Kimble* decision was based on *Noble Drilling Corp. v. Smith*, 412 F.2d 952 (5th Cir. 1969), which involved a platform worker who also operated a "small, but essential mud pump" aboard the drilling tender. His seaman status depended on the substantiality of his work with the mud pump aboard the drilling tender and the court ruled that this was a question of fact to be resolved by the jury. In both *Kimble* and *Smith*, the plaintiffs' connections with the vessel were based on duties which obviously did not take the greater part

of their total working time. Similarly, the petitioner, Prudhomme, did not spend all of his time aboard the work barges, but witnesses' estimates of time spent over water ranged between 30% and 50% of their total working time, and at least half of that time was estimated to have been spent actually aboard the barges. **Yet, in both Kimble and Smith, the plaintiffs were allowed to have what the present claimant, Ralph Prudhomme, was denied: a jury determination of what constitutes substantial work and permanent assignment aboard vessels.**

Furthermore, in a portion of his opinion dealing with the claimant's relationship with the barges in question, the trial judge failed to follow an element inherent in directing a verdict: he did not consider all of the evidence in the light most favorable to the non-moving party. In denying the plaintiffs seaman status, the court was apparently impressed with the fact that the payroll records reveal for the month prior to the plaintiff's accident he spent a total of 6½ hours loading or unloading the barges, and that no other over water time was spent on the barges. **This figure is incorrect and misleading.** In the first place, the petitioner was employed for 2½ months prior to his accident, and the work sheets in the record reveal that a significant portion of this time was spent over water. (See Tr. 189-207 and Statement of Fact No. 7) Secondly, the petitioner was injured on October 21, 1970, and for the month prior to his accident, he received a total of **twenty** hours of over water pay bonus, including time spent not only loading and unloading the barges but also moving equipment aboard the barges, constructing and removing concrete forms and hopper supports, setting and wrecking keyways, etc. Pay sheets made no breakdown as to how much

over water time was spent on the caissons themselves and how much time was spent on the barges, but there was testimony from several witnesses, including the plaintiff himself (not mentioned by the trial judge), that a significant portion of the work constructing the caissons was done directly from the barges. (See Statement of Facts, # 4, *supra*). As the defendants' appellate brief indicates, there was work sheet notation evidence from which the trial judge could have concluded that the plaintiff spent only 6½ hours loading and unloading the barge in the month prior to the accident. The notations could also support findings of considerably lengthier stays certainly more favorable to the plaintiff. In any case, this was a finding of fact to be made by the trier of fact, not by the trial judge.

In addition, the court failed to consider in its opinion the following pertinent testimony and evidence relating to the substantiality of the claimant's work with the barges:

(1) The trial judge considered the claimant's "over water" time only for the month immediately prior to his injury. However, the claimant was employed by the defendant for approximately two months and twenty days before his injury, and the work sheets reveal that he received over water pay for approximately thirty-eight (38%) per cent of the time that he was out there.

(2) The foreman at the job site admitted that there were errors in his time sheet, and indeed there were occasions when the plaintiff was engaged in loading and unloading the barges and doing work at the caisson sites for which he did not get credit for over water time. On Prudhomme's time sheets [defendant's Exhibit No. "1"] for 10-6, 10-7, 10-12 and 10-13,

there are notations of seven and one-half hours work in which plaintiff unloaded dredge well forms, unloaded nose forms, set and wrecked keyways and loaded hopper support forms. These notations, in the record, are in addition to, and underscore the inaccuracy of, the trial judge's six and one-half hour figure.

(3) The witnesses estimated that they spent fifty (50%) per cent of their over water time actually on the barges.

(4) One witness testified that the carpenters spent thirty (30%) per cent of their total working time actually working on the barges. Another witness testified that the carpenters worked about fifty (50%) per cent of the time over water, and that when they worked on the water, they worked on the barges.

(5) The trial court apparently ignored the following direct testimony of Mr. Prudhomme:

"Q. When you use the cargo barge, who was the crew of that barge?

"A. **The carpenters was if it was used. When we was using them, the carpenters was using them—the carpenters was the crew of the boat. They didn't have nobody else on it. So, we had to load and unload them, we had to tie the ropes, we had to go get them at the bank and untie them off the trees or pilings and then tie the tug to them and go unload our forms or whatever we was going to use it for. And when they would get through we would tie it off and then we would untie the tug off of it. Sometimes we would stay and work on them, sometimes**

> **we would just move them, load and unload stuff on them."**

(6) One important inference that the trial judge failed to draw is taken from the fact that the claimant received over water bonus pay at all. If the time he spent over the water was insubstantial in proportion to the rest of his work, there would be no need for over water pay at all. However, the very fact that a bonus was paid for the time spent over water indicates that the time must be significant.

B. Function of the Barges, the Accomplishment of Their Mission, Their Maintenance and Welfare

In considering whether the complainant "contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel," (*Robison*, supra, at 779) the trial judge, without mentioning facts or law, concluded that Mr. Prudhomme made no such contribution: "His actions were not in the service of any vessel." [Appendix B, infra] Yet his very next words belie this conclusion and indeed demonstrate the opposite to be true: "It appeared that the vessel or vessels were there for the service of the carpenters in need of assistance while performing work out in the river on a fixed caisson." [Appendix B, infra] This is quite true—the barges were at the job site to aid in the building of the bridge, to provide a means of transporting men and equipment, to serve as a working area, and to provide storage space for tools and supplies. In so using the barges for just these purposes, Mr. Prudhomme was contributing to the function of those vessels on the river and the accomplishment of their mission: the building of the Atchafalaya River bridge.

The Fifth Circuit jurisprudence is replete with cases of persons like Mr. Prudhomme who served on special purpose vessels, and whose status questions went to the jury because their presence on such vessels was in fulfillment of that special purpose. In the *Robison* case, the court noted that a roughneck working on a drilling platform was a seaman because "Offshore Number 55 was a special purpose vessel, a floating drilling platform. Robison's duties aboard that vessel contributed to her mission, to the operating function she was designed to perform as a seagoing drilling platform." *Robison*, supra, at 779. The jury question raised in *Stanley v. Guy Scroggins Construction Company*, 297 F.2d 374 (5th Cir. 1961) was whether a man engaged in pouring cement into the pilings on a stationary platform was a seaman if he operated from a tugboat loaded with equipment to aid in that project. Using the *Robison* case for guidance, the court ruled that the function of the vessel could very well have been the pouring of cement, and that the plaintiff could have been fulfilling that function despite the fact that he contributed **nothing** to the actual navigation of the vessel—the precise question, the court ruled, was one for the jury to decide. *Stanley* obviously fits the case at hand like a glove, but the holding of that case was nevertheless ignored by both the trial and appellate courts. Similarly, in the *Kimble* and *Smith* cases, the Fifth Circuit upheld jury verdicts because the evidence in both cases revealed that persons in charge of drilling mud equipment aboard a drilling tender could be called a Jones Act seaman because "the duties Kimble performed contributed to the function and mission of the tender, since its sole reason for existence was to support the platform in drilling for oil," *Kimble*, supra, at 849, and the "duties with respect to the mud pump directly contributed to the fulfill-

ment of one of the primary functions of the tender S-25—the pumping of mud and other fluids to the drilling platform for use there," *Smith*, supra, at 956. And in a case precisely on point, *Stafford v. Perini Corporation*, 475 F.2d 507 (1st Cir. 1973), the court affirmed a jury verdict declaring a dock worker to be a seaman because his duties aboard a work barge "directly related to the performance of its mission": **the barge was providing a work area for use in the constructoin of piers for a bridge, and the plaintiff was building and repairing forms for the pouring of concrete.** *Stafford*, supra, at 510.

These cases make it obvious that when dealing with special purpose vessels such as submersible drilling rigs, drilling tender vessels, and work barges, the person is contributing to the function of such vessels and the accomplishment of their mission (See *Robison*, supra, at 779) when he is aiding in the performance of the function for which those vessels were designed or being used. Thus the trial court's observation that the barges were at the job site to aid in the construction of the caissons and the carpenters (including plaintiff) used the barges for just such a purpose, militates **against** any ruling of law that the plaintiff was not contributing to the "function of the vessel" or aiding in "the accomplishment of its mission." (Again, see *Robison*, supra, at 779) **Such questions are ones of fact to be decided by the jury.**

Furthermore, there was additional testimony to the effect that the plaintiff also assisted in the operation and welfare of the vessels. Mr. Prudhomme, and all the other witnesses, testified that the carpenters themselves were actually the crew of the barges, that they tied and untied the lines securing the crafts to the shore, and hooked the lines to the tugs when the barges needed to be moved. It was also the duty of the car-

penters to keep the barges straight and clean when they were being used on the job. The plaintiff himself patched holes on one of the barges and also made and installed a toilet facility on another barge. Certainly these duties performed by the plaintiff were not only duties traditionally done by seaman but are also evidence that he contributed to the "operation or welfare" of the barge. (Again, see *Robison*, supra, at 779)

III. CASES WITH SIMILAR FACTUAL SITUATIONS HAVE NOT BEEN DECIDED AS A RULE OF LAW—THE PRESENT CASE CREATES A CONFLICT IN THE JURISPRUDENCE.

If the Fifth Circuit's affirmation of the trial court's decision is allowed to stand, all persons similarly situated cannot be called seamen as a matter of law. Yet several decisions with striking factual similarities to the present case have required the seaman status issue to be resolved by the jury. **Thus, questions of fact in one jurisdiction are rules of law in another**; a conflict between the circuits exists (and between this decision and others of the Fifth Circuit) which should be resolved by the Supreme Court.

The case most recent and most similar to that of the petitioner is *Stafford v. Perini Corporation*, 475 F.2d 507, decided by the First Circuit in March of 1973. Just as in the case at hand, the plaintiff in *Stafford* was a worker engaged in a bridge building project. As a dockbuilder on the project, the plaintiff's principal duties were to build and repair certain forms which were used in the pouring of concrete in erecting the piers of the bridge, **exactly** the same type of work in which Mr. Prudhomme was engaged in the present matter. The *Stafford* barge also served as a storage area and was used for

transporting the forms from the deck of the barge to the piers themselves. And very much like Mr. Prudhomme, Stafford also did part of the construction work on the piers themselves, and assisted in moving the barge from one site to another by handling the mooring and towing lines. The jury found Stafford to be a seaman, and the Court of Appeals affirmed the trial court's denial of motions for directed verdicts and a new trial. Unfortunately for Mr. Prudhomme, on a strikingly similar set of facts, the trial court ruled that the evidence was insufficient as a matter of law and refused to let the status question go to the jury. Even more unfortunate for Mr. Prudhomme is that the Fifth Circuit saw fit to ignore its own decision in *Robison* (and also many of its other decisions referred to hereinabove), whereas the First Circuit adhered to and relied upon the same *Robison* case in deciding *Perini*.

In another bridge case, and another Circuit, *Harney v. William M. Moore Building Corporation*, 359 F.2d 649 (2nd Cir. 1966), the plaintiff was employed as a pump engineer on board a barge tied to a bridge pier. Between the pier and the shore a cofferdam was being built and it was the plaintiff's job to man the pumps that were used to pump water out of the cofferdam. There were two pumps on the cofferdam and a third pump on the barge. Harney testified that it was also his duty to pump water out of the barge in case it got too high, and to secure the barges if they ever broke loose. In the short time that he was employed by the defendant he never had occasion to either pump out the barge or to secure the barge, so that the only real duty he performed was that of operating the cofferdam pumps. In reversing the district court's dismissal of the plaintiff's Jones Act claim, the Court

of Appeals held that there was sufficient evidence to present a factual question to the jury on the issue of Jones Act seaman status. The court based its holding on the fact that Harney had duties aboard the barge which he had never performed prior to his accident. Certainly, the facts presented in Mr. Prudhomme's case indicate a much more substantial connection with the barges used in the construction of the bridge than those in Harney's case, for Harney had duties with only performance potential, Prudhomme had duties actually performed. **Yet Harney was given a jury trial, Prudhomme was not.**

A third bridge building case is that of *Summerlin v. Massman Construction Company*, 199 F.2d 715 (4th Cir. 1952) in still another and different Circuit. The plaintiff in that case was employed aboard a floating derrick barge which was engaged in pouring concrete into forms incident to the building of a bridge across the river. The plaintiff's primary function was to perform the duties of a fireman on the crane. Based on these facts, the Court of Appeals felt that the status question should have been submitted to a jury and reversed the district court's judgment on the pleadings that there could be no recovery under the Jones Act.

Finally in *Stanley v. Guy Scroggins Construction Company*, 297 F.2d 374 (5th Cir. 1961), a **Fifth Circuit** decision, in conflict with the holding in the instant case, the plaintiff was engaged as a pusher whose particular crew had the job of pouring cement into the pilings under several stationary drilling platforms. The crew got to the work site aboard a tugboat which also hauled out the equipment and the cement to be used in the job on the platforms, much in the same man-

ner as Prudhomme used the barges to haul out the equipment necessary for the construction of the caissons in building the bridge. Stanley generally did all of his work on the platform; Prudhomme, on the other hand, divided his time between the barge and the caissons. Yet, at the appellate level, the court was not so much worried by the fact that Stanley did not spend much working time aboard the tug as it was in whether or not he was contributing to the function of that tug in performing his work on the platform. It regarded the nature of the individual's work on the vessel as much more important than the actual period of time he performed that work, and it reversed the trial court's disposal of the seaman status question on summary judgment and held that the case should have gone to the jury. Stanley's principal connection with the vessel was his use of the tug to haul his men and equipment out to the platforms. Although the cement equipment and pumps remained on board the vessel, Stanley and his men generally did not; they worked on the stationary platform when the pumping of the cement was going on. In this sense, Stanley's connection with his vessel was very tenuous in relation to the work he actually performed, yet because he used the tug in accomplishing his task on the platform, his status question went to the jury. Prudhomme, who worked over water at least thirty-eight percent of the time of his employment and aliegedly spent about half of that time on the barge, was denied a jury determination of the status question.

CONCLUSION

Under the provision of the Jones Act, claimant is entitled to a jury trial of his complaint. In Jones Act cases, the Supreme Court has held that the issue of seaman status is a

question of fact for the jury. Only when reaonable men could decide no other way is a trial court correct in taking such a case from the jury and directing a verdict. When evidence has been presented that a claimant works with a specific fleet of barges, performs a significant portion of his work aboard those barges, and in carrying out his duties, aids in the fulfillment of the function and mission of those vessels, as well as assists, in their navigation and maintenance, then that claimant's seaman status is a question of fact that should be submitted to the jury to decide. This has been done in other similar cases, and the petitioner should have been protected by their applicability to his situation.

By directing a verdict that denied the petitioner's seaman status, the trial court committed error. By affirming that decision, the Court of Appeals for the Fifth Circuit compounded the error. The petitioner was grievously wronged thereby, and the Supreme Court should grant the petition for a writ of certiorari.

DUBUISSON AND DUBUISSON

By William A. Brinkhaus

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(318) 942-6506
Attorneys for Petitioner

CERTIFICATE

I HEREBY CERTIFY that I have served a copy of the above petition for a writ of certiorari on defendants by mailing same to their attorney of record, postage prepaid, at his usual address.

SIGNED at Opelousas, Louisiana, on this 21st day of December, 1973.

William A. Brinkhaus

William A. Brinkhaus
Of Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA OPELOUSAS DIVISION

CIVIL ACTION NO. 16,650

RALPH PRUDHOMME

versus

AL JOHNSON CONSTRUCTION COMPANY-MASSMAN CONSTRUCTION COMPANY, a joint venture, and AMERICAN MUTUAL INSURANCE COMPANY of BOSTON

	MESSRS.
FOR PLAINTIFF	William A. Brinkhaus Dubuisson & Dubuisson P. O. Box 230 Opelousas, Louisiana 70570
FOR DEFENDANTS	John A. Bivins Mouton, Roy, Carmouche & Hailey P. O. Drawer Z Lafayette, Louisiana 70501

SCOTT, JUDGE:

After hearing evidence presented by both complainant and defendant, this Court granted defendants' motion for a directed verdict. These written reasons are filed in support of the ruling of the Court made at the close of evidence.

Complainant, Ralph Prudhomme, a carpenter employed by Johnson-Massman Construction Company in the construc-

tion of a new bridge across the Atchafalaya River at Krotz Springs, Louisiana, was injured while attempting to adjust the position of a cement pouring form used to direct the flow of cement when constructing the substructure and foundation for the bridge. This adjustment was being performed on a caisson, a foundation which is built into the bottom of the river bed and extending upward out of the water to a height sufficient to support the superstructure of the bridge.

The employer, Al Johnson Construction Company-Massman Construction Company, a joint venture, is sued under the Jones Act and under the General Maritime Law on the theory that Mr. Prudhomme was a seaman injured in the course of his employment. On this precise question of seaman status, the Court held that there had been no reasonable evidentiary basis presented at the trial to support a jury finding that Mr. Prudhomme was a member of a crew of any vessel or group of vessels and accordingly defendants' motion for a directed verdict was granted.

Taking the evidence in a light most favorable to complainant, it appeared that Mr. Prudhomme had, during the course of his employment, used any one of a number of barges to transport himself and his supplies to the work site on the caisson. Mr. Prudhomme testified that at times he would work aboard a barge and would cast off lines from the barge as it was to be moved from the river bank to the caisson. His testimony to this effect was not clear as to how often this assistance was rendered or how often he actually worked aboard a vessel. As a carpenter he was given an additional twenty-five cents per hour for each hour he worked "over

water." "Over water," in the terms of the labor contract under which he was hired, meant any time a worker could land in water as a result of a fall. This included time aboard a vessel moving to the work site and on a work site which was next to or surrounded by water. Because of this extra pay allowance, detailed payroll records were kept as to where, how long and on what job a man worked. An examination of the payroll records for the month prior to the date of the accident revealed that Mr. Prudhomme had spent only a total of six and one-half hours either loading or unloading barges; no other work aboard any of the vessels was indicated by the payroll records for this period of time. This type of work would fall into the class of work performed by a longshoreman and not a Jones Act seaman. It must be remembered that this injury occurred neither on a vessel, in the service of a vessel nor while using any of any vessel's appurtenances.

There was no evidence that Mr. Prudhomme was permanently assigned to any vessel or group of vessels, rather when aboard one of these barges his assignment was wholly transitory in character and he did not perform any substantial part of his work aboard a vessel.

He did not eat or sleep aboard any vessel, nor did he on a regular basis report for duty upon any vessel or group of vessels. There was testimony that on at least one occasion Prudhomme did some welding on one of the barges. This transitory work on a vessel will not result in complainant's classification as a seaman. The assignment to perform a single repair job aboard a vessel with no element of permanency is substantially different from day-to-day maintenance of a particular vessel or group of vessels. This difference is suffi-

cient to deny to an injured workman the recovery allowed by law to a seaman. *Rotolo v. Halliburton*, 317 F.2d 9 (5th Cir. 1963).

The group of vessels upon which Prudhomme claims he was a seaman was composed of at least two derrick barges, about four work barges, and one small tugboat. Both the derrick barges and the tugboat had men permanently assigned to assist in the operations of the vessels, the work barges were not manned. These work barges served a number of functions, as can be seen from the group of photos taken five days after the accident and introduced as Defendants' Exhibits 2 and 3. When the river was low one or two barges were connected to form a pontoon bridge enabling workmen to walk out to the caisson in the river. They were also used to carry men and supplies to the second caisson near the east bank of the river. These unmanned barges were vessels without any permanent crew members. If the injury had occurred on a vessel or in the service of a vessel or if Prudhomme had performed a substantial amount of work on a vessel or group of vessels or some other evidence of seaman status had been presented, there indeed might have been a question of fact for the jury. His actions were not in the service of any vessel; it appeared that the vessel or vessels were there for the service of carpenters in need of assistance while performing work out in the river on a fixed caisson.

> "Whether or not one is a seaman or member of a crew is a question of fact depending upon the circumstances of each particular case. All facets of the claimant's employment and duties must be considered." Creel v. Drill

Tender Jack Cleverly, 264 F.Supp. 98, 101 (W.D. La. 1966).

In *Producers Drilling Company v. Gray*, 361 F.2d 432, the Fifth Circuit Court of Appeal clearly outlined the District Court's area of discretion in allowing the question to be presented to the jury:

> "The Court in *Robison*, however, did not interpret the Supreme Court holdings to mean that the question of status was always a question of fact for the jury. Thus, the Court noted 'that the traditional function of the Court and jury still obtains . . . and that a Court, trial or appellate, may in the proper case hold that there is no reasonable evidentiary basis to support a jury finding that an injured person is a seaman and member of a crew of a vessel under the Jones Act.' "

The Court then concluded:

> "There is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman **was assigned permanently to a vessel** (including special purpose structures not usually employed as a means of transportation by water but designed to float on water); **or performed a substantial part of his work on the vessel;** and (2) if the capacity in which he was employed or the duties which he performed **contributed to the function of the vessel or to the accomplishment of its mission,** or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." (Emphasis added.)

Not one of these tests were met. There could be no conflicting inferences from the evidence heard by the Court that

reasonably could lead to any different conclusion. As a matter of law there was not sufficient evidence to submit the question of fact to the jury, for if the jury with the evidence presented in this case had found the complainant to be a seaman this Court could not have let such a verdict stand. The undisputed facts would lead reasonable minds only to the conclusion that Mr. Prudhomme was a shore based workman injured on land with only transitory connections with the operations of the vessels provided for his use.

Prior to the trial of this case this Court was presented with a motion for summary judgment by the defendant on the question of seaman status. At that time the Court felt that the evidence before it did not warrant such a judgment. However, after reviewing all the evidence adduced at the trial, the actual proof made fell short of that required for the submission of this case to the jury. See *Braniff v. Jackson Avenue-Gretna Ferry, Inc.*, 280 F.2d 523, 529 (5th Cir. 1960).

Without seaman's status, and not being injured performing work traditionally performed by a seaman, Sieracki seaman status, Prudhomme lacks standing to assert a claim for unseaworthiness of a vessel. Any claim for negligence is foreclosed by a mandatory compensation plan. Judgment is to be entered in favor of defendants on all claims.

These rulings shall constitute both finding of fact and conclusions of law in keeping with Rule 52(a), Fed.R.Civ.P. Counsel for the defendant is directed to file a formal judgment in keeping with this ruling as provided for in Local Rule 9(e).

THUS DONE AND SIGNED, in Chambers, at Alexandria, Louisiana, on this 20th day of October, 1972.

/s/ Norman S. Scott
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Western District of Louisiana

This is to certify that the above and foregoing contained on this and preceding 4 pages is a true and correct copy of the original.

Sept. 19, 1973

ALTON L. CURTIS, Clerk

By Wallis Berry
Deputy Clerk

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-1441

Summary Calendar

D. C. Docket No. CA 16-650

RALPH PRUDHOMME,

Plaintiff-Appellant,

versus

AL JOHNSON CONSTRUCTION COMPANY-MASSMAN CONSTRUCTION COMPANY, Etc., ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

June 15, 1973

Issued as Mandate: July 19, 1973.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-1441
Summary Calendar*

RALPH PRUDHOMME,
Plaintiff-Appellant,

versus

AL JOHNSON CONSTRUCTION COMPANY-
MASSMAN CONSTRUCTION COMPANY, Etc., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for
the Western District of Louisiana

ON PETITION FOR REHEARING

(JULY 11, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

SUPREME COURT, U. S.
NOV 6 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-615

RALPH PRUDHOMME,

Petitioner,

versus

AL JOHNSON CONSTRUCTION COMPANY - MASSMAN CONSTRUCTION COMPANY, A JOINT VENTURE, AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,

Respondents.

RESPONDENTS-APPELLEES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-615

RALPH PRUDHOMME,
Petitioner,

versus

AL JOHNSON CONSTRUCTION COMPANY-MASSMAN CONSTRUCTION COMPANY, A JOINT VENTURE, AND AMERICAN MUTUAL INSURANCE COMPANY OF BOSTON,
Respondents.

RESPONDENTS-APPELLEES BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

This brief is filed in accordance with Rule 24 of This Court, on behalf of respondents-appellees, who were the original defendants in the District Court.

QUESTION PRESENTED

1) The right to relief under the Jones Act when an alleged seaman is not in the service of his vessel.

STATEMENT OF THE CASE

At the close of the trial on the merits of this case, the District Judge directed a verdict in favor of defendants on both the plaintiff's claims for relief under the Jones Act and for unseaworthiness.

The following specific facts are drawn from the plaintiff's testimony:

1) There was no regular assignment of Mr. Prudhomme to do any work on or connected with any barge or group of barges. (Prudhomme Tr. 35)

2) The work assignments were made on a daily basis, and sometimes several times a day, by the foreman of each union craft. (Prudhomme Tr. 35)

3) When a particular piece of work assigned by the foreman was completed, Mr. Prudhomme's connection with any barge which may have been used in that particular assignment was ended. (Prudhomme Tr. 34)

4) The carpenters were paid twenty-five cents an hour extra for all work done over water, by virtue of union contract. (Prudhomme Tr. 28)

5) The foreman, in this case Charles Sonnier, kept records of the work performed for the purpose of determining the amount paid for work on the water. These were the only records telling specific work performed on the job by the carpenters. (Prudhomme Tr. 30)

6) Mr. Prudhomme had examined the records prior to the trial and could point out no specific errors in the records. (Prudhomme Tr. 31)

7) On the day of his injury, Mr. Prudhomme had not done any work on any barge, except to walk across a barge to get to the pier. (Prudhomme Tr. 39-40)

8) At the time of Mr. Prudhomme's accident, the hopper supports were in no way connected to any crane or any barge, but were resting on the caisson. (Prudhomme Tr. 39)

SUMMARY OF ARGUMENT

1) The plaintiff to recover under the Jones Act must show that he was either permanently assigned to a vessel or performed a substantial part of his work on the vessel, and that such work in connection with the vessel aided in the accomplishment of its mission.

2) In order for one to be entitled to a claim for unseaworthiness one must be injured in the service of a vessel.

3) Where the plaintiff does not show the necessary requisites for Jones Act status or a duty of seaworthiness, a directed verdict is appropriate.

ARGUMENT

Jones Act Status

The test as to whether one is a seaman, entitled to the remedies provided by the Jones Act, is now fairly well settled, and the test is set forth in *Producers Drilling Co. v. Gray*, 361 F.2d 432:

> "... (1) if there is evidence that the injured workman *was assigned permanently to a vessel* (including special purpose structures not usually employed by a means of transportation by water but designed to float on water); *or performed a substantial part of his work on the vessel*; and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accomplishment of its mission*, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips." (Emphasis added.)

This standard breaks itself into two parts, so far as the nature of his employment is concerned, in that he must either be "assigned permanently" or "perform a substantial part of his work."

Mr. Prudhomme's assignments were totally impermanent. On the contrary, any assignment to do a piece of work which necessitated the use of a barge was made daily, or even hourly, and the assignment ter-

minated when the individual piece of work was completed. These facts may be compared to *Creel v. Drill Tender Jack Cleverly*, 264 F.Sup. 98. In that case, the plaintiff spent only about ten (10%) percent of his time on a vessel, and the remainder of his time on a stationary platform. However, the assignment to the vessel in that case was permanent. That is, the plaintiff had recurring, steady duties which were his alone to be performed on the vessel. In the instant case, Mr. Prudhomme had no steady, regular or recurrent duties; and he never knew from one day to the next whether there would be any connection with any barge whatsoever required of him.

As to whether the plaintiff spent a substantial portion of his time in the service of any vessels, even taking all the barges as a group, the Trial Court found that approximately four (4%) percent of the plaintiff's time was spent in connection with barges during his last month of work. Most of this work was of a loading and unloading nature which, while certainly classified as part of the traditional work of a seaman, is also specifically defined as the work of a longshoreman.

What is "substantial" is one of the facts to be determined in the case, as in any other. What the Trial Court has held is that, as a matter of law, the amount of work which the plaintif did on or around barges was not "substantial."

Unseaworthiness Claim

The petition for certiorari does not separately discuss the claim for unseaworthiness made in the Trial

Court. However, we discuss it briefly on the assumption it is not abandoned.

On the day of his accident, plaintiff was moving wooden supports which were resting on the caisson. The caisson was sunken into the bed of the river. These wooden supports were not connected to any vessel in any way. They had been stationary on the caisson since the prior afternoon.

In order to be entitled to the warranty of seaworthiness, one must be in the service of a vessel, performing the traditional duties of a seaman, at the time of his accident. *Atkins v. Greenville Ship Building Corp.*, 411 F.2d 279.

These bare facts confirm the absence of plaintiff's right to the warranty of seaworthiness.

The Directed Verdict

This Court, in *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, held that one's status as a Jones Act seaman is a fact, just as in any other fact in civil litigation, using the following language:

> "As we have said before, this Court does not normally sit to re-examine a finding of the type that was made below.
>
> "We believe, however, that our decision in *South Chicago Coal & Dock Co. v. Bassett, supra,* has not been fully understood. Our hold-

> ing there that the determination of whether an injured person was a 'member of a crew' is to be left to the finder of fact meant that juries have the same discretion they have in finding negligence or any other fact. The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In *Producers Drilling Co. v. Gray, supra,* the Fifth Circuit reviewed previous cases decided by it in light of This Court's decisions in *Senko v. LaCrosse Dredging Corp.,* 352 U.S. 370 (1957); *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251 (1940); and *Gianfala v. Texas Co.,* 350 U.S. 879 (1955).

In *Producers Drilling Co. v. Gray, supra,* the Court stated the following:

> "Since the *Adams* case, this Court has on at least three occasions stated that the issue of status is not necessarily a question for the jury in every case. *Thibodeaux v. J. Ray McDermott & Co.,* 5th Cir. 1960, 276 F.2d 42, 46; *Stanley v. Guy Scroggins Constr. Co.,* 5th Cir. 1961, 297 F.2d 374, 378; *Rotolo v. Halliburton Co.,* 5th Cir. 1963, 317 F.2d 9, 12, cert. denied, 375 U.S. 852, 84 S.Ct. 111, 11 L.Ed.2d 79. In *Thibodeaux,* we affirmed a directed verdict for the defendant on the question of the status of a welder who had a brief work assignment on a barge and whose relationship to the barge was

> described as 'purely transitory.' The Court noted 'the mistaken belief of so many that merely because the status of *who* is a seaman may be a question of fact, the principles summarized by us in *Offshore Co. v. Robison* * * * perforce make every case one of fact for jury decision.' 276 F.2d at 46 (Emphasis in original)."

The Fifth Circuit has continued to apply these principles, including the recent cases of *Barrios v. Louisiana Construction Materials Co.*, 465 F.2d 1157 (5th Cir. 1972), and *Ross v. Mobil Oil Corp.*, 474 F.2d 989 (5th Cir. 1973). In the *Ross* case, as well as in *Cox v. Otis Engineering Corp.*, 474 F.2d 613 (5th Cir. 1973), summary judgment or directed verdicts were upheld on the question of seaman status.

The principle is thus well established, in accordance with *Senko, supra,* that the directed verdict under Rule 50 of the Federal Rules of Civil Procedure is an appropriate action, given the evidence in a particular case. The factual issue of status is to be decided the same as any other factual issue, and any such factual issue is subject to the authority for a directed verdict under Rule 50.

The Scope of Plaintiff's Employment

The defendants had raised in the Lower Courts an issue not necessary for the decision of this case in those

Courts. That is, whether even if the plaintiff at any time could have been accorded status of a seaman, at the time of his accident he was not in the service of any vessel.

The Jones Act, 46 U.S.C. 688, permits recovery by seamen for injuries suffered "in the course of his employment." This has been held to include, for example, driving to work on the vessel where the transportation was furnished by the employer.

However, in the present case, the plaintiff was in the service of no vessel at the time of his accident. If the "course of employment", as used in the Jones Act, is equivalent to the "service of the ship" formula used in maintenance and cure cases, *Braen v. Pfiefer Oil Transport Co.*, 361 U.S. 129, 80 S.Ct. 347; *Vincent v. Harvey Well Service*, (5th Cir.) 441 F.2d 146, then this plaintiff was not in the service of any ship at the time of his accident.

CONCLUSION

This case presents nothing unusual. Given a specific set of facts, both the Trial Court and the Appellate Court found that as a matter of law there was not sufficient evidence to warrant a presentation of the issue of Jones Act status to the jury.

ince the question of status is a fact, the same as other fact in any other case, the application of irected verdict in this case was appropriate.

Respectfully submitted:

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CERTIFICATE

HEREBY CERTIFY that a copy of the above and going Brief on behalf of Respondents-Appellees has duly mailed to the following counsel of record e address indicated:

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fayette, Louisiana, this ____ day of November,

JOHN A. BIVINS